No. 82-2113

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT D. H. RICHARDSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF FOR PETITIONER

ALLAN M. PALMER
(Counsel of Record)
1707 N Street, N.W.
Washington, D.C. 20036
(202) 785-3900

Counsel for Petitioner
Robert D. H. Richardson

September, 1983

THE CASILLAS PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 223-1220

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-2113

ROBERT D. H. RICHARDSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER

The Petition herein has gained added impetus from an unforeseen ally – the government's Brief In Opposition. At note 5 thereof (Br. 7) appears the concession that if petitioner were convicted at a retrial, such conviction must be reversed if "the evidence at the first trial was legally insufficient. . . ." The government thus fully supports our argument that, in the circumstances presented, the second trial would itself be improper because it would violate petitioner's constitutional right not to be twice placed in jeopardy. The remedy advanced to ameliorate this error, however, *i.e.*, reversal of the conviction, is precisely the remedy previously rejected by this Court.

> "[E]ven if the accused is . . . convicted [and] has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to en-

> dure a trial that the Double Jeopardy Clause was designed to prohibit." *Abney v. United States,* 431 U.S. 651, 662 (1977)

Respondent also alleges that the summary procedures to weed out frivolous appeals suggested by *Abney* could not be utilized in cases such as the one at bar (Br. 6) because of their complexity. In support of this argument respondent has engendered a concept previously unknown to the law, *i.e,* "pure double jeopardy" claims (Br. 5, line 6; n. 3 Br. 6; n. 8 Br. 9), as opposed to impure double jeopardy claims. A "pure" claim we are informed, is presented by a case such as *Abney* which can be quickly decided; an impure claim is one requiring appellate courts "to analyze the elements of the charges against the defendant, sift through the trial transcript, review evidentiary exhibits" and the like. (Br. 6) This latter class of impure case is to be denied interlocutory review. We alas – according to respondent – are proponents of an impure claim and are to be shunned by this Court therefore. In its zeal to qualitate that which is merely quantitative, respondent has overlooked a line of double jeopardy cases which demand the very plenary examination it inveighs against.

> "Collateral estoppel is part of the Fifth Amendment's double jeopardy guarantee, *Ashe v. Swenson, supra,* and it is a matter of constitutional fact this Court must decide through an examination of the entire record." *Turner v. Arkansas,* 407 U.S. 366, 368 (1972).

> "Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter. . . ." *Ashe v. Swenson,* 397 U.S. 436, 444, 1970).

Accordingly, it is clear that the depth of review cannot be a bar to consideration of an otherwise viable double jeopardy claim.[1]

In its closing effort to ward off the petition, respondent concludes that while there is presently no conflict in the circuits over the Question Presented, given the state of the relevant decisions, it anticipates the emergence of such a conflict "some day." (Br. 12) Even a cursory review of those decisions reveals that that day has arrived. A conclusion shared by veteran Judges Tamm and Wilkey:

> "Two circuits have held that the trial court's denial of a double jeopardy claim based on the insufficiency of the evidence is not immediately appealable under *Cohen*. One circuit has held to

[1]Despite respondent's protestation's to the contrary, appellate judges can screen insufficiency claims very quickly from a reading of the opposing briefs to determine whether the claim is worthy of full review or is merely spurious. Respondent, we note, was able to summarize the trial evidence herein in one and a half pages in its brief. (Br. 2-3)

A seemingly wasteful labor in view of the fact that, after reviewing the evidence, respondent abandoned its task *in medias res* declining to traverse our well documented showing of the legal insufficiency thereof. (Pet. 9-12) A most revealing omission, since even a minimal counter offer of sufficiency would have aided respondent's efforts to repel the petition.

the contrary." (Pet. App. A, pp. 6a-7a, footnotes omitted.)[2]

ALLAN M. PALMER
(Counsel of Record)
1707 N Street, N.W.
Washington, D.C. 20036
(202) 785-3900

Counsel for Petitioner
Robert D. H. Richardson

September, 1983

[2]In *United States v. McQuilkin*, 673 F.2d 681 (3d Cir. 1982) at page 686, three additional judges perceived a collision between that opinion and precedents in the four, fifth and ninth circuits. We thus have a total of five federal appellate judges who see a conflict in the circuits over the Question Presented where respondent sees none.